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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. TEVITA LUI, Defendant and Appellant.	2d Crim. No. B211852 (Super. Ct. No. PA056054) (Los Angeles County)

Tevita Lui was charged with murder. (1CT 55) He appeals from the judgment entered following his conviction by a jury of the lesser included offense of involuntary manslaughter. (Pen. Code, § 192, subd. (b).)[1] The jury found true an allegation that, in the commission of involuntary manslaughter, appellant had personally used a firearm. (§ 12022.5, subdivision (a).) The trial court sentenced appellant to prison for eight years: the upper term of four years for involuntary manslaughter plus the middle term of four years for the firearm use enhancement.

Appellant contends that the trial court erred in failing to instruct the jury sua sponte on the principle of independent intervening causation. In addition, appellant contends that the firearm use enhancement must be stricken because it was not specifically pleaded in the information.

[1] All statutory references are to the Penal Code unless otherwise stated.

Facts

Prosecution Evidence

On June 17, 2006, appellant went to a birthday party in Canoga Park. Appellant was accompanied by his brother, John Halalova, and his brothers-in-law, Sam and James Tonga. Isaiah Tahaafe and his brother, Iteni Tahaafe, also attended the party. Isaiah Tahaafe and Halalova engaged in a fistfight. Isaiah Tahaafe punched Halalova in the jaw. Halalova fell to the ground and lost consciousness.

Isaiah and Iteni Tahaafe left the party and went to the parking lot of Isaiah's apartment building. About 12 other persons from the party joined them there. One of the persons was the victim, Tangi Mei Hufanga.

Isaiah Tahaafe received a telephone call from appellant and Sam and James Tonga. They said that they were coming to the parking lot. About 40 minutes later, a black Ford Expedition parked in an alley next to the parking lot. Sam and James Tonga, appellant, and Halalova got out of the vehicle. Halalova tried to kick Iteni Tahaafe in the head. Iteni Tahaafe grabbed Halalova's foot, causing him to fall to the ground.

Appellant "just started screaming. Everybody was cussing at each other." Appellant ran to the Expedition and retrieved a shotgun from the back seat. Appellant cocked the shotgun and said, "What's up now, mother fuckers?" Sam Tonga grabbed the shotgun and put it back inside the Expedition.

The cussing continued. Appellant again retrieved the shotgun from the Expedition. While Sam and James Tonga were pinning Isaiah Tahaafe against a fence, appellant cocked the shotgun and aimed it at Tahaafe. "Everybody that was there" told appellant to put the gun away. Appellant walked back to the Expedition and put the shotgun inside the vehicle. But then "[h]e went right back to pick it up."

Appellant approached a group of persons, stopped about two or three yards away from them, and cocked the shotgun. Appellant was pointing the shotgun at the ground and was "moving it back and forth."

Hufanga was in the group of persons confronted by appellant. While appellant was holding the shotgun at "chest level," Hufanga grabbed the barrel of the gun with both

hands. Hufanga "pushed the gun towards the sky" and "tried to take it away from" appellant. Hufanga told appellant to put the shotgun away. During the struggle between appellant and Hufanga, the shotgun discharged into Hufanga's chest. Appellant ran to the Expedition with the shotgun and drove away.

Defense Evidence

Appellant testified as follows:

Appellant retrieved the shotgun from the Expedition because his "brother [Halalova] was getting beat up on the ground." Appellant cocked the shotgun, which at that time was not loaded. Sam Tonga said to appellant, "Give me the gun." Appellant gave the shotgun to Sam Tonga and told him to put it in the Expedition.

Halalova "was on the ground getting pinned down, getting punched." Appellant "felt like we were in danger." He ran to the Expedition, retrieved the shotgun, and loaded it. With the shotgun in his hands, appellant started walking toward Halalova. The shotgun "was pointed downwards" and was not cocked.

Hufanga approached appellant and said, "Give me the gun." Hufanga grabbed the end of the shotgun barrel with both hands and "pulled it towards his chest." Appellant and Hufanga engaged in "a tug of war" over the shotgun. Appellant did not let go of the shotgun because he "was afraid they might use it on me." During the struggle, appellant's finger was not on the trigger. Nevertheless, "[t]he gun went off." Appellant "was shocked."

Causation

Appellant contends that the trial court erred in failing to instruct the jury sua sponte "on the law of intervening and superseding causation." Appellant argues that such an instruction was required because "the jury could have found that Mr. Hufanga's actions [grabbing the barrel of the shotgun] were so unusual that they constituted an unforeseeable and superseding cause of his own death." Appellant asserts: "The present case can be compared to a police officer or civilian who displays a firearm while a crime is in progress. No such person displaying a firearm could reasonably expect that someone would grab the discharge end of the firearm. What could reasonably be

expected is that when someone displays a firearm, the other individual would back off and comply with the commands of the gun wielding individual."

"Case law appears to variously use the terms 'superseding intervening act,' 'independent intervening act,' and 'supervening act,' to describe an act occurring after a defendant's act, which is unforeseeable and breaks the chain of causation." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 369, fn. 8.) The principle of independent intervening causation was explained by our Supreme Court in *People v. Cervantes* (2001) 26 Cal.4th 860, 871: " 'In general, an "independent" intervening cause will absolve a defendant of criminal liability. [Citation.] However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." [Citation.] On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. "A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is 'dependent' and not a superseding cause, and will not relieve defendant of liability. [Citation.] '[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [ ] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.' [Citation.]" [Citation.]' [Citations.]"

Here, the trial court implicitly instructed the jury on the principle of independent intervening causation when it gave CALCRIM No. 580 on involuntary manslaughter as a lesser included offense of murder. The instruction provided in relevant part: "An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. *A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.* In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence." (Italics added.)

CALCRIM No. 580 incorporates the concept of reasonable foreseeability referred to by our Supreme Court in *Cervantes*. The instruction indicates that the defendant will be absolved of liability if the victim's death was a consequence not of the defendant's act, but of an intervening, "unusual" event that was not reasonably foreseeable. (CALCRIM No. 580.) Accordingly, the trial court had no sua sponte duty to give a separate, amplifying instruction on intervening independent causation. "The trial court had a sua sponte duty to instruct the jury on applicable general principles of law. [Citation.] It did so. '[I]t was [appellant's] obligation to request any clarifying or amplifying instructions . . . .' [Citation.] Appellant made no such request to the trial court and 'error cannot now be predicated upon the trial court's failure to give them on its own motion.' [Citation.]" (*People v. Talamantes* (1992) 11 Cal.App.4th 968, 974-975.)

Our conclusion is supported by *People v. Fiu, supra,* 165 Cal.App.4th 360. The *Fiu* court rejected the defendant's contention that the trial court had erroneously failed to instruct sua sponte on the principle of independent intervening causation. The trial court had given CALJIC No. 3.40, which contains the same "direct, natural, and probable consequence" language of CALCRIM No. 580. CALJIC No. 3.40 provides in relevant part: "The criminal law has its own particular way of defining cause. A cause of the _____ is an [act] [or] [omission] that sets in motion a chain of events that produces as a direct, natural and probable consequence of the [act] [or] [omission] the _____ and without which the _____ would not occur." Unlike CALCRIM No. 580, CALJIC No. 3.40 does not define "natural and probable consequence."

In determining that the trial court did not have a sua sponte duty to give a separate instruction on intervening causation, the *Fiu* court reasoned as follows: "CALJIC No. 3.40 correctly indicates, in essence, that liability would not be cut off for an intervening act if the victim's death was nevertheless a 'direct, natural and probable consequence' of defendant's original act. (CALJIC No. 3.40.) *People v. Temple* (1993) 19 Cal.App.4th 1750, 1754-1756, . . . held this instruction to be an adequate statement of the law, without need to amplify (even upon request) with reasonable-foreseeability language. . . . Implicit in *Temple's* reasoning is an assumption that foreseeability is an important

component of causation, but that the language in CALJIC No. 3.40 requiring an injury or death to be a direct, natural, and probable consequence of a defendant's act necessarily refers to consequences that are reasonably foreseeable. We concur with this analysis. . . ." (*People v. Fiu, supra,* 165 Cal.App.4th at p. 372.)

In contrast to CALJIC No. 3.40, CALCRIM No. 580 defines "natural and probable consequence" as a consequence that is reasonably foreseeable. (2CT 279) Thus, the case here for not requiring a sua sponte instruction on independent intervening causation is stronger than it was in *Fiu*.

Appellant contends that defense counsel was ineffective because he did not request a separate instruction on independent intervening causation. The standard for evaluating appellant's claim of ineffective counsel is enunciated in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

It is not reasonably probable that the result of the proceeding would have been different if defense counsel had requested a separate instruction on independent intervening causation. According to his own testimony, appellant held a loaded shotgun in his hands during a violent brawl. He was there to support his brother, who "was on the

ground getting pinned down, getting punched."[2] In these circumstances, it was reasonably foreseeable that someone would struggle with appellant to prevent him from using the shotgun and that the shotgun would discharge during the struggle. Even if such a course of events were unforeseeable, it was still reasonably foreseeable that, as a consequence of appellant's armed confrontation, someone would be harmed by a blast from the shotgun. "[A] defendant whose conduct was a proximate cause of harm is not absolved of responsibility because another person's conduct, negligent or otherwise, is also a substantial or contributing factor in causing the harm. The act of another constitutes a superseding cause precluding responsibility of the initial actor only if the other's conduct is both unforeseeable and causes harm that was not the foreseeable consequence of the initial actor's conduct." (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1328.)

Firearm Use Enhancement

The jury found true an allegation that, in the commission of involuntary manslaughter, appellant had "personally used a firearm, to wit, a shotgun." Pursuant to section 12022.5, subdivision (a), the trial court imposed a four-year prison term for the firearm use enhancement. The information, however, did not allege that appellant had personally used a firearm within the meaning of section 12022.5, subdivision (a). Instead, it alleged that appellant had "personally used a firearm, a shotgun, within the meaning of Penal Code section 12022.53(b)." Section 12022.53 applies only to certain designated felonies. While it applies to the charged offense of murder, it does not apply to the lesser included offense of involuntary manslaughter. (*Id*., subd. (a).) Section 12022.53, subdivision (b), requires "an additional and consecutive term of imprisonment in the state prison for 10 years." (*Ibid*.) It is a more serious enhancement than section 12022.5, subdivision (a), which requires "an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years." (*Ibid*.)

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[2] In his opening brief, appellant declares, "It was undisputed that appellant displayed a shotgun when several individuals were giving his brother a savage beating."

Appellant contends that the section 12022.5, subdivision (a), enhancement must be stricken because it was not specifically pleaded in the information. Appellant argues, "[T]he defense was not on notice that the government would seek to impose an additional term for a weapons enhancement if the defendant was convicted of involuntary manslaughter."

We disagree. Appellant always knew that he was going to have to defend against an enhancement allegation that he had personally used a shotgun. The information alleged the facts giving rise to the enhancement, thus avoiding a due process violation. (*People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 ["To avoid due process violations, the facts giving rise to a sentence enhancement must be alleged in the accusatory pleading so that defendant can prepare his defense"].) For purposes of preparing appellant's defense, it was of no consequence whether the firearm use allegation was pursuant to section 12022.53, subdivision (b), or section 12022.5, subdivision (a). Both statutes contain identical language imposing additional punishment if the defendant "personally uses a firearm."

Section 1170.1, subdivision (e), provides: "All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." These requirements were met here. Section 1170.1, subdivision (e), does not require that the information specify the precise code section for an enhancement.

Our conclusion is supported by *People v. Strickland* (1974) 11 Cal.3d 946. In *Strickland* the defendant was convicted of voluntary manslaughter. The jury found true an allegation that the defendant had used a firearm within the meaning of section 12022.5. Our Supreme Court determined that section 12022.5 was inapplicable. But it declared that the "defendant is subject to additional penalty under section 12022 of the Penal Code, since he committed the offense while armed with a deadly weapon within the meaning of that section." (*Id.*, at p. 951.) The Supreme Court reasoned: " 'The jury . . . found that appellant "did use a firearm" in the commission of the offense. Penal Code section 12022.5 and section 12022 . . . do not define a crime or offense but relate to the

penalty to be imposed under certain circumstances. Thus section 12022 is not a lesser included offense under 12022.5 but section 12022 would be applicable in any case in which 12022.5 applies. Basically 12022.5 is a limited application of section 12022 with a heavier penalty. In the present case appellant did not come within the provisions of section 12022.5, . . . but the jury did find that he used and thus was armed with a firearm, a shotgun, at the time the offense was committed. Appellant was charged in the commission with the use of a firearm under section 12022.5, [and] thus had notice that his conduct [could] also be in violation of section 12022.' " (*Id*., at p. 961.)

Here, section 12022.5, subdivision (a), would be applicable in any case in which section 12022.53, subdivision (b), applies. Thus, although appellant was charged with using a firearm within the meaning of section 12022.53, subdivision (b), he had notice that his conduct could also be in violation of section 12022.5, subdivision (a). Therefore, pursuant to the reasoning of *Strickland*, the trial court properly imposed additional punishment pursuant to section 12022.5, subdivision (a).

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Burt Pines, Judge

Superior Court County of Los Angeles

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